

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUAN DAVILA-BAJANA,)	Civil Action No. 04-253E
)	
Plaintiff,)	Hon. Sean J. McLaughlin
)	United States District
v.)	Judge
)	
TIM HOLOHAN, <u>et al.</u> ,)	Hon. Susan Paradise Baxter
)	Chief United States Magistrate
Defendants.)	Judge
)	
)	ELECTRONICALLY FILED

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

AND NOW, come Defendants, by their attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania; Paul D. Kovac, Assistant United States Attorney for said district; and Douglas S. Goldring, Assistant General Counsel, Federal Prison Industries, Inc., and respectfully submit this Motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. In support of this Motion, Defendant avers as follows:

1. Plaintiff initiated this action by filing a Complaint alleging the following claims: (1) In accordance with Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), Plaintiff claims that while he was assigned to work in the Federal Prison Industries ("FPI") factory, he was exposed to tobacco smoke and silica dust, in violation of the Eighth Amendment. Complaint at ¶¶ 1, 12; (2) that he was removed from his FPI work assignment as a result of his complaints relating to this exposure and asserts this claim as a First Amendment violation. Id.; and (3) that Defendants were negligent, in violation of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671.

2. However, Plaintiff, who is appearing pro se, has failed to properly exhaust administrative remedies concerning his Eighth Amendment Claim. Moreover, under the Total Exhaustion Rule, which Defendants argue should be made applicable in this case, Plaintiff's First Amendment claims should also be dismissed. Finally, Plaintiff has failed to bring his FTCA claim to Court within the six-month time limit as established by the statute of limitations applicable to FTCA claims. Accordingly, this Complaint should be dismissed pursuant to Rule 12(b)(6).

3. WHEREFORE, Defendants respectfully request that the Court enter an Order granting Defendants' Motion to Dismiss and granting such other and further relief as the Court may deem just and proper.

A proposed Order is attached, and a Memorandum of Law is filed simultaneously with this Motion.

Respectfully submitted,

MARY BETH BUCHANAN
UNITED STATES ATTORNEY

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400 First Street, NW, 8th Floor
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Dated: November 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2005, I electronically filed and/or caused to be served via first-class U.S. mail, a true and correct copy of **DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** to the following:

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s/Paul D. Kovac
PAUL D. KOVAC
Assistant U.S. Attorney